INDEX

CITATIONS

84239—38——1

Cases—Continued.

Cases—Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 28

DAN B. SHIELDS, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE DISTRICT OF UTAH, AND INTERSTATE COMMERCE COMMISSION, PETITIONERS

v.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The District Court wrote no opinion. The opinions of the Circuit Court of Appeals (R. 327-342) are reported in 95 F. (2d) 911. The opinion of the Interstate Commerce Commission (R. 314-325) is reported in 214 I. C. C. 707.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 1, 1938 (R. 327). The jurisdic-

tion of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether and to what extent a determination by the Interstate Commerce Commission that a carrier is not an interurban electric railway within the meaning of the exemption proviso in Section 1, First, of the Railway Labor Act, as amended June 21, 1934, is binding upon the courts, and whether the courts may determine the question *de novo* without giving any weight to the decision of the Commission.

2. Whether the determination by the Interstate Commerce Commission, that the Utah-Idaho Central Railroad Company is not an interurban electric railway is arbitrary, capricious, or without substantial evidence to support it.

STATUTE INVOLVED

The section of the Railway Labor Act (c. 691, 48 Stat. 1185, U. S. C., Title 45, Sections 151–163) primarily involved is the proviso in Section 1 exempting certain interurban electric railways from the definition of "carrier". Section 1, in so far as material to this proceeding, reads as follows:

> Section 1. When used in this Act and for the purposes of this Act—
>
> First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate

Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or surburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

Section 2, Eighth, which is the only provision of the Act which the record shows respondent to be violating, reads as follows:

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be

specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Section 2, Tenth, which prescribes criminal penalties for the violation of Section 2, Eighth, *supra*, reads in part as follows:

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute

in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *.

STATEMENT

On October 1, 1934, the National Mediation Board requested the Interstate Commerce Commission to determine whether the Utah Idaho Central Railroad Company came within the terms of the proviso exempting certain electric railways from the operation of the Railway Labor Act (R. 40, 54, 266, 314). The Commission designated an Examiner to hold a hearing and take testimony, and a hearing was held in Ogden, Utah, at which testimony was introduced by the railroad company (Plaintiff's Ex. 49, R. 266–313). The proposed report of the Examiner was submitted to the carrier, exceptions were filed with the Commission, and oral argument held before Division Three of the Interstate Commerce Commission (R. 314–315). On March 18, 1936, the Commission handed down its opinion (214 I. C. C. 707; R. 314–325), in which it found that the respondent was not an interurban electric railroad within the meaning of the exempting proviso.[1]

[1] The Commission found that none of the stocks or bonds of respondent was owned by any steam railroad, and that "The only issue therefore is whether it is a street, interurban, or suburban railway within the meaning of the proviso"

The report of the Commission contains a careful and concise analysis of all the evidence that was produced, including the evidence upon which respondent relies. We respectfully refer the Court to pages 709–713 of that report (R. 316–322), both for a detailed summary of the evidence and so that the Court may see for itself the impartial manner in which the Commission approached the problem and the reasonableness of its decision. Only the more important facts will be set forth in this brief.

The report of the Commission and the evidence adduced before it showed that the Utah Idaho Central Railroad was an electric railway connecting points in Utah and Idaho. The main line is 94 miles long, and there are two branch lines, seven and 14 miles long, respectively. The principal cities served are Ogden, Brigham, and Logan, Utah, and Preston, Idaho (R. 316–317). The road carries freight, passengers, mail and express (R. 319).

Respondent has many of the physical characteristics of an interurban railroad. Its tracks on the whole are of lighter weight (R. 284–285), its grades slightly steeper (R. 285), its curves sharper (R. 285), its stations and side-tracks more frequent (R. 285–286, 295–296), its motive power of less capacity (R. 281–282), its side-tracks shorter than is customary on trunk line railroads (R. 285–286,

(214 I. C. C. at 708, R. 315). This case does not raise, therefore, any question as to the relationship of respondent to "a" or "the" steam railroad system of transportation.

215). Approximately one-fifth of its mileage is located in public streets or highways in cities, towns, and villages; the remainder on private right-of-way (R. 286–287). The passenger business of respondent is operated in the same manner as that of any interurban electric railway (R. 319).

But the respondent is predominantly a carrier of freight. Even when the road was first completed in 1916, freight revenues were substantial (I. C. C. Ex. 26, R. 229), and since 1918 freight revenues have exceeded passenger revenues (*ibid.*). During the five years from 1930 to 1934, inclusive (the last years for which figures were introduced in evidence before the Interstate Commerce Commission), the total freight revenues constituted over 80% of the total revenues of the carrier (*ibid.*).[2]

[2] Exhibit 26, introduced before the Interstate Commerce Commission (but not before the court below except as a part of the record before the Commission, Plaintiff's Ex. 49), shows that passenger and freight revenues from 1925–1934 were as follows (R. 229):

	Passenger	Freight
1925	$344,605.97	$459,996.64
1926	211,763.20	428,314.70
1927	178,175.39	493,562.82
1928	161,668.76	526,516.72
1929	146,554.60	490,455.81
1930	115,545.03	465,421.41
1931	89,632.57	396,387.89
1932	67,410.45	372,474.35
1933	61,429.99	391,718.19
1934	61,346.25	378,934.25

The above figures exclude baggage revenues, mail revenues, milk revenues, freight-switching revenues, and miscellaneous transportation revenues, none of which were substantial.

In 1934 passenger revenues were only 16.2% of freight revenues, and only 13.6% of total transportation revenues.[1]

In 1934 the respondent operated an average of 11.5 passenger trains per day, such trains averaging 1.1 cars per train, and an average of 7.7 freight trains per day, the average length of such trains being 6.2 cars (R. 319, 210, 221, 295, 298–299). Thus respondent operated an average of 12.7 passenger cars per day as compared to 47.7 freight cars. The freight carried consisted in the main of beets, sugar, potatoes, sand and gravel, milk, canned goods, tomatoes, cattle, coal, gasoline, and lumber (I. C. C. Ex. 28, R. 233–234)—commodities which obviously are not ordinarily carried by interurban railways. During the last half of 1934 respondent carried 6354 carloads of freight, 2226 being handled entirely upon respondent's lines and 4128, or approximately 64%, being interchanged with other carriers. (*Ibid.*, cf. R. 319–320.) Of the freight traffic interchanged with other lines, 2075 cars moved to or from points in Utah and 2053, or approximately one-half, moved to or from points in other states. Thus, almost one-third of the freight traffic carried moved in interstate commerce. A large proportion of the freight traffic consisted of agricultural products being transported in raw form to processing plants and in processed form to connecting railroads en route to market (R. 319). For

[1] Computed from I. C. C. Exhibit 26 (R. 229).

special products such as milk, peas, and tomatoes, respondent provided short special service trains to the processing plants (R. 319, 277).

This traffic moved almost entirely in standard freight equipment furnished by connecting railroads (R. 283, 320). Interchange connections were maintained with four railroads: the Oregon Short Line, the Union Pacific, the Southern Pacific, and the Denver and Rio Grande (R. 313, 320). Respondent is a party to practically all of the tariffs publishing through freight rates to or from its territory, and its interchange traffic generally moves on joint rates (R. 312, 320).

Respondent owns seven electric locomotives, which are used to haul its freight traffic, 178 freight cars, 99 of which are interchangeable with steam railroads; and only 22 passenger cars, including passenger motor cars (R. 283, 320).

The number of cars per freight train in 1934 was necessarily much smaller than that on the trunk lines, inasmuch as the physical equipment and power of respondent prevents it from running long trains. Because of the smaller number of cars per train, the cost per car-mile per trainman was considerably greater than that on a trunk line (R. 216-221, 303).

On the basis of this evidence the Commission found that respondent was not an interurban railroad.

After the decision by the Interstate Commerce Commission, the National Mediation Board or-

dered the respondent to post the formal notice prescribed by Section 2, Eighth, of the Act (R. 138). The carrier refused to post the notice (R. 138). Instead, on June 24, 1936, it brought this suit against the United States Attorney, praying for a declaratory judgment and an injunction. In addition to claiming that it was an interurban electric railway, and accordingly not subject to the Act, the carrier alleged that the Act was in many respects unconstitutional (R. 22–26, 29–32). The United States Attorney, in his answer, denied the charges of unconstitutionality and alleged that the determination of the Interstate Commerce Commission, already referred to, was conclusive, since it was not arbitrary or capricious and since it was based upon substantial evidence (R. 32–36). The Interstate Commerce Commission, by leave of court, intervened as party-defendant, and filed a similar answer (R. 39–41). In reply to these answers, respondent contended that the decision of the Interstate Commerce Commission was arbitrary and unreasonable and without an evidentiary foundation (R. 53–55).

In the District Court respondent attempted to retry the question already determined by the Commission. The defendants objected to the introduction of new evidence bearing on the question of whether respondent was or was not an interurban, and insisted that only the record before the Inter-

state Commerce Commission could be introduced (R. 78, 83, 111). The defendants maintained that inasmuch as Congress had expressly directed the Commission to determine that question, the only issue before the court was whether the Commission had acted arbitrarily, capriciously, or without substantial evidence, and that the record before the Commission was the only evidence admissible on that question. The court overruled the objection, and permitted respondent to try the question *de novo* (R. 83, 111). Over objection respondent introduced, as original evidence, substantially the same evidence[4] (see pp. 6–9, *supra*) as that before the Commission (R. 77–141). Since that evidence has already been analyzed, it will not be summarized here. It is sufficient to point out that the figures for 1935, introduced into evidence by respondent, show that respondent carried even a larger proportion of freight and ran less passenger

[4] The exhibits introduced in the court below which were not in evidence before the Interstate Commerce Commission are Exhibits 8, 27–1, 27–2, 27–3, 28, and 29–48, R. 166, 231, 232, 235–266. The court below took judicial notice of Exhibits 29, 30, and 31, which are publications of the Interstate Commerce Commission; they are not printed in the record. Exhibits introduced before the Commission which were not in evidence before the district court, except as a part of the record made before the Commission, are found at R. 229, 233, 234, and are numbered Exhibits 26 and 28 (their numbers before the Commission). There are thus two different sets of exhibits numbered 26 and 28.

trains in 1935 than in 1934.* The defendants then introduced the report of the Commission (R. 314–325), and respondent introduced the record made before the Commission (R. 266–313).

In addition to the evidence relating to whether the Utah Idaho Central was an interurban, respondent also introduced testimony showing that its employees had formerly been represented by the Amalgamated Association of Street and Electric Railway Employees, that the Brotherhood of Railway Trainmen, one of the four railroad brotherhoods, claimed a right under the Railway Labor Act to represent its train and yard service employees, that the Brotherhood demanded that respondent accept a contract for such employees with similar terms as to rates of pay and conditions of employment to those in effect on steam railroads, and that such a contract was not suited to its method of operation and would entail prohibitive expense (R. 120–138). This evidence is not relevant or material to any of the issues of this case; the Railway Labor Act does not require respondent either to deal exclusively with the so-called railroad brotherhoods or to accept demands made by them but unsatisfactory to it.

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*Passenger revenues in 1935 were only $64,400 out of $514,000 total revenues, or 12.6% (R. 198). The average number of passenger trains operated daily decreased from 11.5 in 1934 to 9.6 in 1935, while the average number of freight trains increased from 7.7 to 7.8 (R. 210).

The District Court found, on the basis of the evidence introduced before it and of the evidence before the Commission, that respondent was an interurban electric railway (R. 67, 147). The court did not state that the conclusion reached by the Commission was arbitrary, capricious, or not based upon substantial evidence, but only that it was "contrary to law". Cf. R. 67 and R. 149–150. The court thereupon granted an injunction against enforcement of the Act against respondent by the United States Attorney (R. 68–69). In view of its decision that the Act did not apply to respondent, the court did not pass upon any of the constitutional questions raised.

The decision of the District Court was affirmed by the Circuit Court of Appeals, Judge Bratton dissenting (R. 327–342). The majority of the Circuit Court of Appeals appears to hold that the Interstate Commerce Commission had no power to determine whether or not respondent was an interurban railway, but only to decide whether it was "part of a general steam railroad system of transportation." The court accordingly found that the District Court had not erred in trying the former issue *de novo*, and it accepted the findings of the District Court that respondent was an interurban railway (R. 332–334). Judge Bratton was of the opinion that the finding of the Interstate Commerce Commission was binding upon the court if "supported by substantial evidence, unless the

action transcends the authority of the Commission or presents some other fatal irregularity." (R. 337). After examining the evidence carefully, he concluded that the Commission's determination was not arbitrary, or capricious, or made without substantial evidence to support it, and that it was, therefore, controlling upon the Court (R. 338–342).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was binding upon the courts.

2. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was binding upon the courts unless arbitrary, capricious, or not supported by substantial evidence.

3. In failing to hold that the determination by the Interstate Commerce Commission that respondent was not an interurban electric railway was not arbitrary, capricious, or unsupported by substantial evidence.

4. In failing to hold that the District Court erroneously admitted into evidence and relied upon testimony as to respondent's status which was not included in the record before the Interstate Commerce Commission.

5. In holding that respondent was an interurban electric railway.

6. In holding that respondent was exempt from the Railway Labor Act.

SUMMARY OF ARGUMENT

I, A. In the Railway Labor Act, Congress authorized the Interstate Commerce Commission to determine which lines operated by electric power fall within the exemption proviso for interurban electric railways, and the determination of the Commission is binding upon the courts unless arbitary, capricious, or unsupported by evidence. This is established by a long line of authorities. The lower courts in the instant case gave no weight to the Commission's decision and decided the question independently, thus completely disregarding these principles. The holding of the majority of the Circuit Court of Appeals that the Commission was not authorized by the statute to determine whether particular electric lines were interurban, but only whether they were parts of a general steam-railroad system of transportation, is contrary to the plain meaning of the Act.

There is no merit in respondent's arguments that the Commission's decision should not be accepted by the courts. The Commission's determination is one of fact. *Shannahan* v. *United States*, 303 U. S. 596. It is as binding upon the courts when attacked collaterally, as here, as if directly assailed. The courts are bound by the determination under the Railway Labor Act, although they were not bound by decisions of the Commission interpreting

earlier exemption provisos for interurban electric railways; for the Railway Labor Act differs from the prior exemptions in that it authorizes the Commission to determine which lines are exempted. Under the decisions of this Court, the Commission's determination is binding upon the courts even though Congress has nowhere expressly limited the scope of judicial review. The attack upon the constitutionality of the Railway Labor Act in this case does not have the effect of rendering all questions of fact in the case "constitutional facts" to be independently determined by the courts. Respondent's argument to the contrary entirely misconceives the meaning of this Court's decisions, indicating that certain questions of constitutional fact may be tried *de novo*.

B. Inasmuch as the Commission's determination under Section 1 of the Railway Labor Act is neither a regulation nor an order but merely a finding of fact, it should be accepted as conclusive provided the requisites of a fair hearing have been complied with.

II. The opinion rendered by the Interstate Commerce Commission is neither arbitrary, capricious, nor unreasonable, and is based upon substantial evidence. When a carrier earns only 13.7% of its total transportation revenue from passenger traffic, a decision that it is not an interurban railway is supported not only by substantial evidence but by the weight of the evidence as well. The fact that the physical characteristics of respondent's line are

those of interurban railways is not controlling, in view of the proportion and kind of freight traffic transported. The freight carried is not "peculiarly local"; almost two-thirds of it is interchanged with the steam-railroads and constitutes the same kind of traffic as is carried by such roads. In holding that such a road was not an interurban railway, the Commission properly applied the principles laid down by this Court. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299; *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1.

In a number of cases during the 12 years preceding the 1934 amendments to the Railway Labor Act, the Interstate Commerce Commission had been called upon to decide what carriers were interurban electric railways within the meaning of various exemption provisos in the Interstate Commerce and related Acts. In these cases the Commission had consistently interpreted the phrase "interurban electric railway" as not including electric lines engaged to a large extent in the transportation of freight in the same equipment as the steam roads and interchanging such freight with the steam roads. Congress was aware of these decisions when it amended the Railway Labor Act in 1934. When Congress chose the Commission to make the determination under the Railway Labor Act, the inescapable inference is that it approved the principles which the Commission had previously followed in deciding such cases.

The majority of the court below apparently was of the opinion that there had been a course of administrative interpretation of similar exemption provisos showing that the Commission regarded respondent as an interurban railway. An examination of these so-called administrative precedents will demonstrate that they do not support the conclusion drawn from them. They are based upon the failure of the Commission on certain occasions to treat respondent as if it were NOT an interurban railway, not upon any affirmative decision of the Commission holding respondent to be an interurban. On the contrary the Commission in formal proceedings has twice held that respondent was not an interurban. The most that can be said for respondent is that the administrative precedents are conflicting. Accordingly they cannot be regarded as controlling here. *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299, 312.

ARGUMENT

I

The Scope of Judicial Review

A. THE DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION THAT PLAINTIFF DOES NOT COME WITHIN THE EXEMPTION PROVISO IS BINDING UPON THE COURTS UNLESS ARBITRARY, CAPRICIOUS, OR NOT BASED UPON SUBSTANTIAL EVIDENCE

In Section 1 of the Railway Labor Act Congress specifically authorized the Interstate Commerce

Commission to determine which lines operated by electric power fell within the exemption proviso for interurban electric railroads. This Court has decided in numerous cases that in such circumstances decisions of the Interstate Commerce Commission[6] as well as of other administrative bodies[7] may not be ignored by the courts—that such decisions are binding, at least if supported by substantial evidence, and are neither arbitrary nor capricious.

A long line of authorities plainly establishes that "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it" (*Virginian Ry Co.* v. *United States*, 272 U. S. 658,

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[6] *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *Pennsylvania Company* v. *United States*, 236 U. S. 351; *Florida* v. *United States*, 292 U. S. 1; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57; *United States* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 314; *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775.

[7] *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *St. Joseph Stockyards Co* v. *United States*, 298 U. S. 38, 51; *Acker* v. *United States*, 298 U. S. 426, 434; *Morgan* v. *United States*, 298 U. S. 468, 477; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Decatur* v. *Paulding*, 14 Pet. 497; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479; *Lewis* v. *Frick*, 233 U. S. 291; *Tang Tun* v. *Edsell*, 223 U. S. 673.

665), and that "Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment." (*Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304.)

The lower courts in the instant case refused to recognize these established principles. While they did not challenge the accuracy of any of the specific facts found by the Commission, they permitted the case to be tried *de novo* without limiting the proof as to the status of respondent to the record before the Interstate Commerce Commission. Although the findings of the trial court* and the

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*The District Court gave no statement of the reasons which impelled it to ignore the determination of the Interstate Commerce Commission. Its findings state only that "the uncontradicted evidence" before the court and before the Interstate Commerce Commission "shows that plaintiff * * * is now and ever since its construction has been an interurban electric railway" and that the determination of the Interstate Commerce Commission to the contrary "is contrary to and is against the law." (R. 67–68.) That this finding was not intended to be a ruling that the Interstate Commerce Commission acted without evidence to support its decision was indicated by the following colloquy between the court and counsel at the end of the trial (R. 149):

"Mr. THOMAS: Our position is, unless this court can find that the Interstate Commerce Commission lacked authority, failed to give a due hearing, or acted without any evidence to support it, that its findings cannot be contradicted by the court.

"The COURT: I am going to give you the leeway on that. I am not going to go outside of the terms of this record to make any negative finding one way or the other."

opinion of the majority of the Circuit Court of Appeals* are somewhat confusing on the point, it does not appear that either court stated that there was no substantial evidence to support the conclusion reached by the Commission. Nevertheless, the majority of the Circuit Court of Appeals upheld the action of the District Court in exercising its own independent judgment on the question of whether respondent was an interurban railway, and in failing to give any weight whatsoever to the ruling of the Commission to the contrary.

Judges Lewis and Williams were of opinion that the Commission was authorized by the statute only to determine whether interurban electric railways are operated as a part of a general steam-railway system of transportation, not to determine whether a particular electric railway is an interurban, and that accordingly they were not bound by the Commission's decision on the latter question. This

*The opinion of Judge Lewis states that (R. 330): "The Commission arrived at its conclusion solely on its own estimate of the facts and not because of any direct testimony that the line was not in fact an interurban electric railway. There was none, but there was direct, positive proof by at least one competent, qualified witness that it was and at all times has been an interurban electric railway." This might be regarded as holding that there was no evidence before the Commission that respondent was not an interurban railway because the general manager of respondent, who was the only witness, said that respondent was an interurban, and no one testified to the contrary. According to this view the facts as to how respondent operated its line would be entitled to no weight as against such an expression of opinion.

construction of the statute, which had never previously been suggested by counsel for respondent, is plainly untenable. The statute authorizes the Interstate Commerce Commission "to determine after hearing whether any line operated by electric power falls within the terms of this proviso." The proviso exempts:

1. Any street, interurban, or suburban electric railway,
2. Unless such railway is operating as a part of a general steam-railroad system of transportation,
3. But shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

If an electric railway is not a street, interurban or suburban railway, it cannot fall within the proviso. Accordingly, if the Commission is to determine which lines operated by electric power fall within the proviso, it must decide whether the lines are street, interurban or suburban. Cf. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299.

Respondent may argue that the ordinary limitations upon the scope of judicial review of administrative decisions are not applicable here because (1) the determination by the Commission in this case is one of law rather than one of fact; (2) in cases arising under other statutory exemptions for interurban railways, the courts have determined

for themselves what carriers came within the exemptions; (3) the statute does not specifically state that the Commission's findings shall be binding upon the courts; (4) the constitutionality of the statute is attacked in this case; and (5) this is not a proceeding to set aside an order of the Interstate Commerce Commission but one to enjoin the United States Attorney. We shall take up each of these contentions in turn and show that none of them justifies disregarding the Commission's determination.

(1) Respondent may contend that inasmuch as none of the facts as to the manner in which it carries on its business are in dispute, the determination as to whether those facts make it an interurban railway is one of law rather than one of fact, and therefore for the courts to decide. That the question is one of fact and not one of law was settled by this Court in *Shannahan* v. *United States*, 303 U. S. 596, 599, wherein the Court declared with respect to this very statutory provision:

> The function of the Commission is limited to the determination of a fact.[10]

In any event, the complete answer to the argument was given in *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, in response to a

[10] The ruling to the contrary by Judge Woolsey of the Southern District of New York in *Hudson & Manhattan R. Co.* v. *Hardy*, 22 F. Supp. 105, was rendered before the decision of this Court in the *Shannahan* case.

similar contention that the courts need not accept the decision of the Interstate Commerce Commission as to the meaning of "undue preference" where the facts were undisputed. The Court there declared (235 U. S. at 330), in language equally applicable here:

> * * * the court below, in substituting its judgment as to the existence of preference for that of the Commission *on the ground that where there was no dispute as to the facts it had a right to do so*, obviously exerted an authority not conferred upon it by the statute. * * * It cannot be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action. [Italics supplied.]

(2) Respondent has referred to *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, and *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1, in both of which this Court decided for itself whether a particular carrier was an interurban railway, and to *United States* v. *Idaho*, 298 U. S. 105, in which the Court upheld independent judicial determination of the analogous question of whether a particular branch line constituted a spur track.

These cases have no application here, inasmuch as the provisions of the Interstate Commerce Act

under which they arose did not authorize the Commission to make the determination as to which carriers fell within their terms. This omission is, of course, vital. A statute which directs the Commission to determine which carriers are interurban electric railways is fundamentally different, with respect to the weight to be given the decision of the Commission made thereunder, from one which does not."

Before the passage of the amendments to the Railway Labor Act in 1934, various sections of the Interstate Commerce Act and other statutes regulating the railroads (including the original Railway Labor Act of 1926) had exempted "street,

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" Respondent argues that the Commission was authorized to determine the application of the exemption proviso in Section 1 (22) of the Interstate Commerce Act because of its power to "pass incidentally" upon the question when an application for a certificate of convenience and necessity is before it. But the case from which the quoted phrase is taken (*Texas and Pacific Ry. Co.* v. *Gulf, Colorado and S. F. Ry. Co.*, 270 U. S. 266, 272), as well as the subsequent decisions of this Court in *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469, and *United States* v. *Idaho*, 298 U. S. 105, demonstrate that that exemption proviso established a limitation upon the Commission's jurisdiction, the scope of which was not to be determined (except incidentally, in which case it was not binding upon the courts) by the Commission itself. In *United States* v. *Idaho*, this Court pointed out that the question of (298 U. S. at 109) "whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission."

interurban, or suburban electric railways not operating as a part of a general steam railroad system of transportation." Interstate Commerce Act, Secs. 1 (22), 20a (1); Locomotive Inspection Act, Sec. 1, 43 Stat. 659, U. S. C., Title 45, Sec. 22; Transportation Act of 1920, Sec. 300, 41 Stat. 469; Railway Labor Act of 1926, Sec. 1, 44 Stat. 577. These statutes did not authorize the Interstate Commerce Commission to determine which lines operated by electric power came within the terms of the exemption. On the contrary, they imposed limitations upon the jurisdiction of the Commission, and the duty of construing them necessarily devolved upon the courts and not upon the Commission itself. The *Piedmont, Chicago North Shore* and *Idaho* cases, arising under such provisions of the Commerce Act, were concerned with the jurisdiction of the Commission, a question which the statute did not authorize the Commission to decide for itself; accordingly, in those cases the Court did not pass upon the status of a particular property under the Act by way of review of the Commission's determination, but *de novo*.

This form of statutory exemption for interurban electric railways raised serious administrative difficulties when applied to those railroads which in some respects resembled interurban railways and in other respects ordinary commercial roads. Neither the carriers nor the Commission could be assured in advance of final judicial determination whether any particular line of electric railway was

subject to the Act.[13] The Commission repeatedly pointed out that the statutory language was unsatisfactory, and urged that it be made more specific.[14]

Experience under the Railway Labor Act of 1926 apparently demonstrated the advisability of establishing a mechanism by which it could be determined in advance of proceedings under the statute which of these electric railways were subject to the Act and which came within the exemption. When the 1934 amendments were under consideration by Congress, the Board of Mediation recommended that the Interstate Commerce Commission, which was more experienced in such matters than the Board itself, be authorized to make such a determination.[14] Accordingly, the Act was amended so as to *authorize* and *direct* the Interstate Commerce Commission to decide which carriers were exempted by the proviso. The advantage of having all such questions decided by a single body "in-

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[13] The confusion resulting from this uncertainty appears in both the *Piedmont* and *Chicago North Shore* cases. In the former the carrier was required to begin construction of a new line of road before it could obtain a judicial determination that it did not come within the exemption and that the construction was illegal; in the latter, a decision that the carrier was subject to the Act might have invalidated millions of dollars of securities previously issued.

[14] See excerpts from Annual Reports of the Interstate Commerce Commission, 1921 through 1935 (R. 246–260).

[14] See Hearings before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., S. 3266, pp. 22, 162; Hearings before House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., H. R. 7650, pp. 22, 84.

formed by experience" seems obvious. Cf. *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454; *United States v. Louisville & Nashville R. Co.*, 235 U. S. 314, 320; *Virginian Railway Co. v. United States*, 272 U. S. 658, 665.

The Railway Labor Act thus differs from the earlier statutory provisions exempting street, suburban, and interurban electric railways in that it *expressly authorizes* the Interstate Commerce Commission to decide what carriers come within the exemption. This added provision will be completely nullified if the courts can ignore the decisions of the Commission. Disregard for the express words of the statute certainly can not be justified on the authority of cases construing statutory exemptions which do not contain any comparable language.

(3) Counsel for respondent urged in its brief in opposition to the granting of a writ of certiorari that the determination of the Interstate Commerce Commission is not binding upon the courts because Congress has not stated expressly that it was to be binding or in any other manner defined the scope of judicial review. This argument would make a Congressional grant of authority to an administrative body a futility unless Congress also specifically provided that the courts shall accept the administrative determination and not decide the question *de novo*. But when Congress authorizes and directs an administrative agency to decide a question of fact, its plain intention is that the

agency and not the courts decide the question, even in the absence of an express limitation on the courts' right of review.

In none of the decisions cited above (p. 19) supporting the general principle as to the scope of judicial review was there a specific legislative limitation upon the power of the courts. Deliberately omitted from that list of authorities were cases arising under such statutes as the Federal Trade Commission Act and the National Labor Relations Act, which provide specifically that the findings of the administrative body shall be conclusive if supported by evidence. The Interstate Commerce Act contains no such provision.

Respondent claims, however, that the provision in Section 16 (12) of the Interstate Commerce Act that, in suits in equity to enforce orders of the Commission made under that Act, the court shall enforce the order "If, after hearing, that court determines that the order was regularly made and duly served," is the equivalent of a statutory prescription of the scope of judicial review. The language quoted, it should be observed, deals only with the formal requisites bearing upon the validity of the Commission's orders, and then only with respect to equity suits brought to enforce such orders. It does not apply to suits for penalties and suits to enjoin the enforcement of orders of the Interstate Commerce Commission; such suits are controlled by different statutory provisions not

containing the language upon which respondent relies. The scope of judicial review of Interstate Commerce Commission decisions has been defined in suits under the Urgent Deficiencies Act to set aside orders of the Commission, and not in suits brought under Section 16 (12).

That the provision quoted does not have the significance respondent attaches to it is shown by the fact that the long line of decisions defining the scope of judicial review in Interstate Commerce Commission cases does not rely upon it. These decisions did not create a novel doctrine; the rule applied by the courts to Interstate Commerce Commission decisions had been previously established in cases involving other administrative agencies. It stems from such cases as *Kendall* v. *United States*, 12 Pet. 524; *Decatur* v. *Paulding*, 14 Pet. 497; *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, and *Gaines* v. *Thompson*, 7 Wall. 347, all of which hold that the discretionary acts of executive officers may not be independently reviewed by the courts. The doctrine was stated in *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108–110, as follows:

> But there is another class of cases in which the rule is somewhat differently, and perhaps more broadly, stated, and that is that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by

the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. * * *

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

This rule has been applied not only in Interstate Commerce Commission cases, but generally. It was applied to an order of the Secretary of Agriculture defining the meaning of sausage in *Houston v. St. Louis Independent Packing Company*, 249 U. S. 479, 484, despite the absence of any statutory provision whatsoever determining the scope of judicial review.

These decisions are emphasized because they completely refute the argument that only when Congress has expressly so provided are administrative decisions binding unless arbitrary or unsupported by evidence. They show that the decisions under the Interstate Commerce Act, Packers and Stockyards Act and Shipping Act cannot be explained away on the premise suggested by plaintiff. They demonstrate that all that is necessary to

involve judicial recognition of the powers of administrative officers is a legislative mandate authorizing an administrative agency to determine a particular matter.

Respondent has suggested that such cases as the "sausage" case, which do not arise under statutes providing that administrative orders shall be enforced if "regularly made and duly served," are distinguishable because they deal with the regulations of an executive department rather than of an independent administrative body. The claim is that the acts of cabinet officers have a different status than those of other administrative officials because of the statute providing that:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. [1 Stat. 28, 17 Stat. 283, 5 U. S. C., Sec. 22.]

But the provision quoted plainly does no more than *authorize* the making of regulations, just as Section 1 of the Railway Labor Act *authorizes* the Interstate Commerce Commission to make a particular determination. The former prescribes the scope of judicial review no more than does the latter.

The opposing argument reduces itself to the proposition that the acts of cabinet officers have for some unexplained reason a standing before the courts superior to those of administrative bodies. There is no intrinsic reason why this should be so; on the contrary, every consideration of policy would require that the decisions of expert quasi-judicial administrative agencies should be given at least equal weight. The decisions of this Court indicate that the same principles apply to the acts of cabinet officers and of other agencies. Cf. *Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1; *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433.

(4) Respondent contends that the courts must make an independent determination of the status of electric railways whenever the constitutionality of the underlying statute is attacked. The cases relating to the determination of so-called questions of constitutional fact (e. g., confiscation) are cited. *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38; *Crowell* v. *Benson*, 285 U. S. 22.

This argument completely misapprehends the meaning of those decisions. They hold only that when a fact to be determined itself establishes constitutional rights, the courts may exercise their independent judgment; the principle has found expression only with respect to those facts which determine whether an administrative body has acted within its constitutional power.

Here the question whether respondent is an interurban railway is clearly not one of constitutional fact. Inasmuch as respondent is admittedly engaging in interstate commerce, the Interstate Commerce Commission has constitutional jurisdiction to make the determination authorized by the Railway Labor Act. The substance of respondent's argument is that if the constitutionality of a statute is attacked in a case, all questions of fact in the case (or at least those which might determine the result in favor of the respondent on other than constitutional grounds) automatically become "constitutional facts" which must be determined *de novo* by the courts. Thus, it is urged, by alleging unconstitutionality (at least when in good faith) a complainant might deprive the determination of an administrative body of any weight, though such determination would otherwise be controlling. Such a proposition surely finds no support either in the reasoning or the holding of the *St. Joseph Stockyards Case*, of *Crowell* v. *Benson*, or of any other decision with which we are familiar. It is inconsistent with numerous recent cases such as *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49; *Washington, Virginia and Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142; and *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, in each of which the Court held that the findings of fact of the administrative

gency supported by evidence were conclusive despite an attack upon the constitutionality of the statute.

(5) The apparent theory of respondent's case was that the determination of the Commission could be ignored if the suit was brought against the United States Attorney to prevent enforcement of the Act rather than directly against the order of the Commission.[15]

The substance of this astounding proposition is that the Commission's findings should be ignored in a collateral attack although if directly attacked they would be conclusive unless arbitrary or unsupported by evidence. The argument that the decision of the Commission has *less* weight in a collateral than in a direct attack apparently attempts to reverse the usual rule against collateral attacks upon administrative or judicial proceedings. Such an argument is plainly untenable. *Cf. Butte, Anaconda & Pac. R. R. Co.* v. *United States*, 290 U. S. 127; *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144;[16] *Moore* v. *Robbins*, 96 U. S. 530; *Stewart* v. *McHarry*, 159 U. S. 643, 650; *Marquez* v. *Frisbie*, 101 U. S. 473; *Tang Tun* v. *Edsell*, 223 U. S. 673.

[15] Nowhere in the bill of complaint (R. 1–12), amended bill (R. 17–27), or amendment to the bill (R. 29–32) is the order of the Commission mentioned.

[16] In these two cases, in which the validity of a ruling of the Interstate Commerce Commission was assailed in a suit at law, the Court held that the Commission's decision was absolutely binding upon the courts. See pp. 37–38, *infra*.

A direct attack on the decision of the Interstate Commerce Commission, before a three-judge court in the manner prescribed by the Urgent Deficiencies Act (Act of October 22, 1913, c. 32, 38 Stat. 208, 219), will not lie. *Shannahan* v. *United States, supra.* No other method of directly assailing the Commission's determination would seem to be available. The question of the validity of the Commission's findings can, therefore, only come before a court in a proceeding in which they are collaterally involved. Such a proceeding might be a criminal prosecution under Section 10 of the Act or a suit to enjoin criminal prosecution,[17] or a civil action to enforce the Act [18] or to prevent enforcement of an order of the National Mediation Board.[19]

If the determination of the Commission is not to be given effect in such cases, it can have no effect at all. Since there can be no other kind of attack, the result of granting a trial *de novo* in all cases in which the Commission's findings are only before the court collaterally will be to render entirely nugatory the statutory provision authorizing and directing the Commission to make the determination.

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[17] See for example *Brotherhood of Railroad Shop Crafts* v. *Lowden*, 86 F. (2) 458, cert. den., 300 U. S. 659.

[18] See for example *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515.

[19] See for example *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F. (2d) 757.

Respondent insists that since this is a suit to enjoin criminal prosecution, its status must be determined upon the same basis as in a criminal action, and that in such an action the Sixth Amendment would require the question to be determined independently by the court itself. Acceptance of this position would mean that no criminal penalties could ever be imposed for violation of orders of administrative bodies without permitting the criminal court to retry *de novo* all the questions previously administratively determined. This is plainly not the law. Cf. *United States* v. *Grimaud*, 220 U. S. 506; *Houston* v. *St. Louis Independent Packing Company*, 249 U. S. 479.

B. THE DETERMINATION OF THE INTERSTATE COMMERCE COMMISSION SHOULD BE FINAL IF MADE AFTER A HEARING

Although our primary position is that the determination of the Interstate Commerce Commission is binding upon the courts unless arbitrary, capricious, or unsupported by substantial evidence, we suggest to the Court that the scope of judicial review of the Commission's determination, under Section 1, First, of the Railway Labor Act may be even more restricted.

The function of the Interstate Commerce Commission under the Railway Labor Act is not to regulate, but merely to decide a question of fact which will determine whether particular electric

railways are subject to the jurisdiction of one administrative agency or another. The Commission enters no order; its duty in making the determination is purely legislative, and entirely different from its ordinary task of fixing rates and making other administrative rulings. This Court has held in cases arising under other statutes that when the Interstate Commerce Commission, acting outside its regulatory capacity, is authorized to determine questions of fact for other executive agencies, its determination is not subject to review by the courts. *Butte, Anaconda & Pacific R. Co.* v. *United States*, 290 U. S. 127, 143; cf. *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172.

Inasmuch as Section 1, First, of the Railway Labor Act requires the Commission to make its determination "after hearing", the Commission's decision would not be binding unless made after a hearing. A court would thus have power to determine whether any of the necessary requisites of a fair hearing were lacking. The court could thus determine whether the parties were given notice and an opportunity to be heard, to introduce evidence and to cross-examine witnesses, and whether the decision was based upon evidence introduced at the hearing. If these requisites are satisfied, as they plainly are in the instant case, the Commission's determination should be conclusive.

II

The Determination by the Interstate Commerce Commission That Respondent Was Not an Interurban Electric Railway Is Supported by Substantial Evidence and Is Neither Arbitrary nor Capricious

The opinion rendered by the Interstate Commerce Commission speaks for itself, and it is unnecessary to argue at length that it is neither arbitrary, capricious, nor unreasonable, and that it is based upon substantial evidence. The fairness and reasonableness of the opinion, the painstaking care with which the Commission analyzed and gave consideration to all of the evidence before it, and the factual bases of the decision are all manifest upon its face. When a carrier earns only 13.7% of its total transportation revenue from passenger traffic, a decision that it is not an interurban railway is supported both by substantial evidence and by the weight of the evidence as well. Even if the scope of judicial review were not so strictly limited, the decision of the Commission should be upheld.

Respondent argues, however, that there is no evidence to support the Commission's conclusion (1) because the physical characteristics of the line are those of interurban railways, and (2) because most of the freight carried is "peculiarly local" (brief in opposition, page 46).

(1) Respondent's main argument is that because it is physically incapable of hauling trains as long as those operated by the steam railroads, it must be regarded as interurban regardless of how much freight it carries. Since, under this view, the physical characteristics of the line are controlling, it is claimed that the Interstate Commerce Commission erred in attributing any weight at all to the amount and kind of freight business done by respondent and that the evidence as to such matters cannot support the Commission's conclusion. The standard which respondent thus insists be accepted is much too simplified. Many factors must be taken into consideration in determining whether a carrier is or is not an interurban. The physical characteristics of the road are among these factors. But clearly, evidence showing what respondent carries, how the transportation service is tied in with that of the steam roads, what proportion of its revenue is derived from freight of the same kind as that carried by the steam roads, and other similar items are entitled to consideration and are evidence supporting any decision the Commission may reach. In *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, and *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U. S. 1, this Court recognized that both types of facts must be considered, and in doing so indicated that the kind of business done was of primary importance. Whether most important or not, however, a decision based upon such facts can hardly

be regarded as without substantial evidence to support it.

(2) Respondent attempts to minimize the importance of its freight traffic by asserting that the freight service is primarily local in nature. In fact, respondent goes so far as to assert that all but about 10% of the freight cars moved are tied into "respondent's peculiarly local service" (brief in opposition, pp. 45–46).

A description of what respondent includes in its designation of "peculiarly local" traffic demonstrates the lack of foundation for this argument. Respondent describes as local all shipments of agricultural materials delivered to processing plants on its lines, all shipments of products used in processing agricultural commodities and of other kinds of agricultural supplies, all shipments of agricultural products to market, and all shipments of building materials to processing plants (*ibid*, R. 139–140). The record indicates that a large proportion of the products so described were shipped to or from respondent's lines in interstate commerce on the steam roads. Cf. R. 233–234. A definition of "local" or "interurban" traffic which includes all shipments in interstate commerce of food products or of material to be used in the processing of such products plainly contravenes all prior legal and popular conceptions as to the meaning of those terms.

The figures presented by respondent are further distorted by the double inclusion of the only freight

traffic which might legitimately be termed "local" is that which both originates and is delivered on respondent's line. To secure the figure of only 10% nonlocal transportation out of "8693" cars, respondent includes the 2336 cars which respondent did not interchange with other lines [20] both in the 4373 cars received by respondent and in the 4020 cars originated upon respondent's line.[21] See brief in opposition, pages 44–46; cf. R. 141. The nature of respondent's business in 1935 is not truly shown by these exaggerated figures based upon respondent's peculiar definition of local service, but by the admitted fact that of the 6357 (not 8693) cars transported by respondent, 4021 or 63% were interchanged with the trunk line railroads and, accordingly, must have constituted the same kind of traffic as is carried by such roads and not traffic peculiarly interurban or local in nature (R. 141).[22] Thus not 10% but 63% of respondent's freight traffic cannot be regarded as part of a peculiarly interurban service.

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[20] Presumably the special services provided by respondent (see p. 9, *supra*) are included in the figures of traffic not interchanged with other lines.

[21] These figures were for the last half of 1935. The figures considered by the Commission (p. 8, *supra*) were for the last half of 1934 (R. 233–234, 319–320), these being the latest figures offered in evidence before it. The 1935 figures were offered in evidence by respondent in the district court (R. 139–141). The slight difference between the 1934 and 1935 figures would not seem to be material.

[22] 2,450 of these 4,021 cars moved in interstate commerce (R. 139–140).

That the conclusion reached by the Interstate Commerce Commission was neither arbitrary nor capricious is demonstrated by an analysis of the previous decisions of this Court and of the Commission itself determining the meaning of "interurban electric railway".

The Decisions of This Court. This Court has, on two occasions, determined the application of similar exemptions for interurban railways. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299; *United States* v. *Chicago North Shore & Mil. R. Co.*, 288 U. S. 1. In both cases the Court recognized that interurban railways were lines "chiefly devoted to passenger traffic" (286 U. S. at 307). In each case the Court pointed out that "it is not always easy to draw the line," that "Instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception * * *." See 286 U. S. at page 312; 288 U. S. at page 10. The *Piedmont & Northern*, 94.5% of whose revenue came from freight traffic, was "not such a case" (286 U. S. at page 312). It clearly was not an interurban. The *Chicago North Shore* case dealt with the application of Section 20a of the Interstate Commerce Act to a carrier 76% of whose revenue was derived from passenger traffic and only 22% from freight. The latter carrier was regarded by the Court as presenting a borderline case. The Court conceded "that the proper classification of

the railway is not free from difficulty." (See 288 U. S. 1, at page 13.) Doubt was removed in that case by prior administrative construction of Section 20a as applied to the particular carrier involved (288 U. S. at page 13).

The Utah Idaho Central, with over 80% of its revenue derived from freight traffic, falls between the *Piedmont & Northern*—the easy case—and the *Chicago North Shore*—the borderline case. It is not so clearly a standard freight railway as the Piedmont, because the latter, in addition to carrying even a larger proportion of freight traffic, was part of an interstate through route with steam carriers, and was of somewhat heavier construction.[20] On the other hand, the Utah Idaho Central is clearly much less like an interurban than the Chicago North Shore, which was described by this Court as follows (288 U. S. at page 10):

> The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. *The freight business is subsidiary to this primary function,* and is not fairly comparable to that ordinarily transacted by a standard steam railroad. *Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline*

[20] Its locomotives, though lighter than those on steam lines, were heavier than those of the Utah Idaho Central, and could haul longer freight trains.

freight business. The main terminals serves only the passenger and merchandise freight traffic.

We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. [Italics supplied.]

The Utah Idaho Central never was predominantly a passenger line, with its freight business "subsidiary to this primary function"—the carriage of passengers. Certainly it cannot be so regarded at the present time when only 13.7% of its transportation revenue is derived from passenger traffic.

With the *Piedmont* presenting an easy case and the *Chicago North Shore* a close one, and the respondent falling between and not possessing the chief characteristics which made the North Shore an interurban,[24] it would seem that under this

[24] Many of the facts which, according to respondent, show that it is an interurban, were also present in the *Piedmont* case. The carrier there argued, just as respondent does here, that it was an interurban because some of its trackage was laid on city streets and operated jointly with street car lines, its motive power was electric, lower voltage and smaller power capacity were employed than on standard steam lines, the signal system was not suitable for use on standard steam lines, the electric locomotives were lighter, and the passenger cars were self-propelled rather than drawn by locomotives. (See 286 U. S. at page 308.) These factors

Court's decisions respondent was properly classified as not being an interurban railway. Thus, even if the question was to be decided *de novo* by the courts, without giving any weight to the Interstate Commerce Commission decision, it would appear that the Commission, rather than the court below, correctly applied the principles laid down by this Court.

But as has been pointed out (pp. 18–20, *supra*), in this case it is not necessary to go that far. The scope of judicial review is different under the Railway Labor Act than under the sections of the Interstate Commerce Act involved in the *Piedmont* and *North Shore* cases, which did not authorize the Interstate Commerce Commission to make the determination. The only question here is whether the Commission's decision was arbitrary, capricious or unsupported by the evidence. Regardless of whether or not a court would reach the same conclusion, there can be no doubt at all that the Commission's finding satisfies this test.

The Commission's previous interpretations of the term "interurban electric railway".—In a number of cases during the 12 years preceding the 1934 amendments to the Railway Labor Act, the Interstate Commerce Commission had been called upon to decide what carriers were interurban elec-

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were deemed by the Court to be outweighed by the fact that the carrier was engaged mainly in carrying freight, and that its line and equipment had been adapted to the carriage of freight. (See 286 U. S. 308–9.)

tric railways within the meaning of various exemption provisos in the Interstate Commerce and related Acts. In these cases the Commission had formulated and frequently stated its views as to those factors which determined whether a railway was an interurban. When Congress chose the Commission to make the determination under the Railway Labor Act, the inescapable inference is that it approved the principles which the Commission had previously followed in deciding such cases.[35] If Congress intended the Commission to adopt other standards than the ones it had already established, it would presumably have so stated in the Act.

As early as 1922, in a case holding that the Sacramento Northern Railway was not an interurban within the meaning of the exemption in Section 20a,[36] the Commission described the basic charac-

[35] This inference is confirmed by the fact that different tests had been applied by other agencies. There was a distinct conflict between the doctrine applied by the Commission and that applied by the old Railroad Labor Board, established under the defunct Title III of the Transportation Act of 1920, which held that a number of carriers (including the Piedmont & Northern) engaged to a large extent in transporting freight were interurbans. See *United States Railway Labor Board Decisions*, Vol. I, p. 53, Dec. No. 33.

[36] The title of the case is *In the Matter of the Application of the Western Pacific Railroad Company for Authority to Acquire Control of the Sacramento Northern Railway and to Purchase the Bonds of the Sacramento Northern Railroad*, 71 I. C. C. 653.

teristics of interurban railways as follows (71 I. C. C. at 656-657):

> We are by no means convinced, however, that the Northern is an interurban electric railway as that term is used in the statute. Much of the transportation service rendered by it, no doubt, is similar to that rendered by electric interurban railways. *The service of such railways, however, is distinguished by its local and limited character and by the fact that the bulk of their revenues are derived from the transportation of passengers.* Their facilities for handling freight are usually inadequate or lacking so as to disable them from engaging in its general transportation. The amount of business interchanged by them with connecting carriers is ordinarily very small. [Italics supplied.]

The Sacramento was held not to be an interurban largely because:

> Since the time of its organization its revenues from freight, mail, and express have exceeded those received from the transportation of passengers. Indeed its revenue from freight alone has been practically equal to its passenger revenue.

This decision was re-affirmed on rehearing in 1923. See *Proposed Control of Sacramento Northern by Western Pacific Railroad*, 79 I. C. C. 782.

In a case decided in 1924, the Commission described the distinguishing features of an inter-

urban railway as follows (*Application of Section 15A of the Interstate Commerce Act to Electric Railways*, 86 I. C. C. 751, 753):

> Interurban electric railways, on the contrary, are frequently constructed in large part in public streets or highways. The bulk of their revenues is usually derived from passenger traffic directly subject to State regulation. Their owned equipment, as a rule, is not interchangeable with steam roads. The nature of their construction and local law frequently prevent more than limited use on their lines of the equipment of steam-railroad connections.

In 1927, in a case involving the application of a similar proviso in the Locomotive Inspection Act (43 Stat. 659, U. S. C., Title 45, Sec. 22) to a number of electric railways, including respondent, the Commission again construed the exemption for interurban railway not to cover general carriers of freight. See *In the Matter of Rules and Instructions for Inspection and Testing of Locomotives Propelled by Power Other Than Steam Power*, 122 I. C. C. 414. Respondent was a party to that proceeding and was specifically found not to be an interurban railway. The Commission said (at pp. 424–425):

> It is well known that electric cars were at first confined to street service in cities and towns. Gradually the lines were extended to the suburbs. Next came the idea of ex-

tending the lines from city to city. These three steps gave rise to the terms street, suburban, and interurban electric railways. *These lines were limited almost exclusively to carriage of passengers.* They were built largely upon streets and public highways. The only material difference between street, suburban, and interurban lines was the extent of the lines. *If the line extended from city to city it was termed an interurban although handling the same traffic and being operated in substantially the same manner as the street or suburban line.* We think this is the usual conception of the interurban line today.

Obviously the character of the lines may change without a change in the name of the operating company. The record here shows that the name of a carrier, whether it is called a railroad, traction system, interurban railway, or power and light company, indicates nothing as to the character of the line or the nature of the traffic handled. We must look to the substance of the matter. A line which today extends only between two cities, *and is dependent upon passenger traffic for the bulk of its revenues, might properly be termed an interurban line.* In a period of years it might through natural development or consolidation become a railway comparable with our steam railroads and still retain its original name. It would no longer, however, be an interurban

railway in substance and in fact. There would be a point, although not definitely defined, where the line passed beyond the true interurban. Such is the case with several of the lines here considered. They have developed into railways which are more than interurbans, and which do not fall fairly within the expression "street, suburban, and interurban electric railways" as used in this act. The distinguishing feature of their operation is that electric, instead of steam, motive power is used. We think such carriers are not excluded from the scope of the locomotive-inspection act, as amended. [Italics supplied.]

In the same year, the Commission held that the Piedmont & Northern was not an interurban electric railway within the meaning of the exemption proviso in Section 1 (22) of the Interstate Commerce Act. *Proposed Construction of Lines by Piedmont & Northern Ry. Co.*, 138 I. C. C. 363, 368-372.

These principles were re-affirmed in 1931 in *Railway Mail Pay: In the Matter of the Application of Illinois Terminal Company*, 174 I. C. C. 796, 799. The Commission there held, after quoting from the *Sacramento Northern* and *Locomotive Inspection Act* cases, that the Illinois Terminal Company was not entitled to the mail rates fixed for "interurban electric railway common carriers"

under the Act of July 2, 1918, 40 Stat. 748-9, U. S. C., Title 39, Sec. 570."

These decisions show a consistent course of interpretation of the phrase "interurban electric railways" by the Interstate Commerce Commission, before the enactment of the 1934 amendment to the Railway Labor Act, to the effect that electric railways, engaged to a large extent in the general transportation of freight, were not interurban. It seems plain that when Congress authorized the Commission to decide which electric railways were interurban for purposes of the Railway Labor Act, it did not intend or expect the Commission to depart from the principles previously laid down."

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[*] In its brief in the Circuit Court of Appeals (p. 35), respondent intimated that the companies involved in the Illinois Terminal were operated as part of a steam railway. The Commission's report (174 I. C. C. at 798) shows that 84% of the system was electrically operated. The case is cited here, not for its holding on the facts, but for its adherence to the doctrine previously set forth in the *Locomotive Inspection* case.

[**] In its report in the instant case, the Commission declared (quoting from its own prior decisions in *Texas Electric Railway*, 208 I. C. C. 193, and *Piedmont and N. Ry. Co.*, 211 I. C. C. 4) (R. 323-324):

"The Commission's views as to what constitutes an interurban were stated in Rules for Testing Other Than Steam Power Locomotives,' supra. Those views should not be lightly departed from after Congress has authorized the Commission to determine the status of electric railways under a similar exemption provision in an act not otherwise administered by us. * * *

"Previous to the amendment to the Railway Labor Act on June 21, 1934, this Commission had passed upon the status

Respondent has claimed that the Commission has not been consistent in its decisions on this subject. The cases upon which respondent relies to prove the alleged inconsistency do not in any way conflict with the principles established in the cases previously discussed. A large number of the cases, decided between 1911 and 1915, dealt with the question whether the Commission could order the establishment of through routes with electric lines carrying freight. *Cincinnati & Columbus Traction Company* v. *Baltimore & Ohio Southwestern Railroad Company et al.*, 20 I. C. C. 486; *St. Louis, Springfield and Peoria Railroad et al.* v. *Peoria and Pekin Union Railway Company*, 26 I. C. C. 226; *Louisville Board of Trade et al.* v. *Indianapolis Columbus and Southern Traction Company et al.*,

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of numerous electric railways under more or less similar exemption provisions in other acts administered by us. Those decisions recognized a class of electric railways which were regarded as more than interurbans and were sometimes referred to as commercial railways operated by electric power. The distinction between them hinged largely upon the amount and character of freight business handled, an interurban being considered primarily a carrier of passengers and its freight traffic largely local. When Congress authorized this Commission to determine the status of electric railways under the Railway Labor Act, which is not otherwise administered by us, it is reasonable to suppose that it did so because of our experience in passing upon such questions under similar exemption provisions in other acts. This may also be regarded as a pretty good indication that Congress used the word "interurban" in the same sense as the Commission had interpreted that term in its decisions."

27 I. C. C. 499; *Chicago, Ottawa and Peoria Railway Company* v. *Chicago and Northwestern Ry. Co. et al.*, 33 I. C. C. 574. Since the provisions of the Interstate Commerce Commission Act involved contained no exception for interurban lines, it was immaterial in those cases whether the roads concerned were or were not interurban. No showing was made as to the proportion of freight carried. The Commission merely spoke about the electric lines concerned as interurbans, without, of course, making any ruling as to their status. In one typical case the Commission pointed out that, although the lines carried freight, they were "primarily carriers of passengers." *Louisville Board of Trade* v. *Indianapolis C. & S. Traction Co.*, 27 I. C. C. at 500. Such dicta are plainly not inconsistent with the more recent decisions already discussed.

Michigan R. Co. v. *Pere Marquette R. Co.*, 74 I. C. C. 496 (1922) was the same kind of case; in that case it appeared that the line in question derived only 24% of its revenues from freight. But there, too, whether or not the line was an interurban was not material to the decision the Commission was called upon to make. In *Application of Section 15 (a) to Interstate Public Service Co.*, 117 I. C. C. 228 (1926), the Commission held that a line which could not interchange its equipment with the steam roads, and which derived less than 24% of its revenue from freight, (and only 26% of that from carload freight), was not an interurban.

Neither of these cases is at all inconsistent with the Commission's present position. In the *Electric Railway Mail Pay Cases*, 58 I. C. C. 455 (1920), 98 I. C. C. 737 (1925), the Commission did not purport to consider the question of which electric lines were interurban.[39] See p. 60, *infra*.

Respondent argues that these cases and other publications, including reports of the Bureau of the Census (R. 260–266), show that interurban railways may carry freight, and that since the Commission now holds that no line carrying freight is interurban, the Commission has departed from its original position.

But it is clear that the Commission has never adopted the position respondent attributes to it; in its opinion in this very case the Commission concedes that interurban roads may carry freight without, for that reason alone, losing their status as interurbans (R. 424). When a road carries a relatively small portion of freight[40] or handles it in a manner entirely different from that in which it is

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[39] Respondent's brief in opposition (p. 51) contains a quotation from the first *Electric Railway Mail Pay* case purporting to show that the Commission there said that some *interurban* lines derived greater revenue from freight and express than from passenger business. The quotation consists of two passages, seventeen pages apart in the opinion quoted (58 I. C. C. 459, 476), neither of which *separately* has the meaning which would be drawn from the single quotation.

[40] *Michigan R. Co.* v. *Pere Marquette R. Co.*, 74 I. C. C. 496; cf. *United States* v. *Chicago North Shore and Milwaukee R. Co.*, 288 U. S. 1.

carried by the steam roads; or is unable freely to interchange the freight carried with the steam roads,[21] the Interstate Commerce Commission has not classified it as interurban. Conversely, when a road is engaged in the general transportation of freight as a substantial portion of its business, when such freight is carried in the same equipment as that of the steam railroads and is freely interchanged with them, and when the electric road participates in joint rates with the steam roads, the Commission holds that it is more than an interurban. In coming to this decision the Commission takes into consideration the factors stressed by the respondent but gives greater weight to those just described. Opinions may of course differ as to how much weight shall be given to each factor, but the decision must be made somewhere and under this statute Congress intended it to be made by the Interstate Commerce Commission.

That Congress was aware of the effect of permitting the Commission to make these determinations appears from the testimony before the congressional committees when the Act was pending. The delegation of authority to the Commission was supported by Mr. George M. Harrison, representing the railroad employees organizations, on the ground that it would definitely result in bringing

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[21] *Application of Section 15 (a) to Interstate Public Service Co.*, 117 I. C. C. 298.

within the Act such carriers as respondent." It was opposed by Mr. C. D. Cass, of counsel for respondent in this case, in behalf of the American

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"Mr. Harrison stated [Hearings, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., H. R. 7650, p. 84]:

"The next question in regard to the scope is that we have some railroads in this country that are operated by electric power. They are engaged in the general business of transporting freight and passengers and interchange that business with the steam railroads. They constitute a part of the general railroad system of the country.

* * * * * *

"Those railroads that I have in mind might properly be referred to as acting in the classes such as the Pacific Electric, the Piedmont and Northeastern, the Chicago South Shore & South Bend, the Oklahoma Railway, the Fort Dodge, Des Moines & Southern.

"We have no desire to bring under this bill the organization of ordinary street or interurban railroads and neither does the bill in our opinion do that.

"In order to make it sure that only such electric line railroads would come under the bill as are engaged in that character of service that makes them common carriers in the true sense, the bill provides that the Interstate Commerce Commission shall designate what particular electric railroad shall come under the scope of the bill." See also Hearings before Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., S. 3266, pp. 35, 162.

The Commission has held, for the same reasons as appear in its opinion in the instant case and in the face of the same objections, that each of the five carriers referred to by Mr. Harrison was not an interurban within the meaning of the Act. See *Pacific Electric Ry. Co.*, 215 I. C. C. 414; *Piedmont & Northern Ry. Co.*, 211 I. C. C. 4; *Chicago South Shore & South Bend R. R.*, 214 I. C. C. 167; *Oklahoma Ry. Co.*, 218 I. C. C. 123; *Fort Dodge, Des Moines & Southern Ry. Co.*, 211 I. C. C. 9.

Transit Association, because he feared that it would have the same result."

Respondent has referred to the repeated recommendations in the Annual Reports of the Interstate Commerce Commission from 1921 through 1935 (R. 246–260) that the exceptions in various parts of the Interstate Commerce Act for street, suburban, and interurban electric railways be amended so as specifically to exclude carriers engaged in the general transportation of freight, and argues that this shows that such electric railways were regarded as coming within the terms of the existing exemption provisions. Examination of these recommendations will indicate that their purpose was to make the law more definite and explicit rather than to alter it. That the Commission was seeking to clarify rather than to change the substance of the existing law seems obvious in view of its consistent interpretation of these provisions not to include such carriers during the very period in which it was making its recommendations. The contrary conclusion can be posited only on the assumption that the Commission regarded

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[11] See Hearings, Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., S. 3266, pp. 97–108. See also the statement of Charlton Ogburn and P. J. Shea, on behalf of the Amalgamated Association of Street and Electric Railway Employees, in which they opposed the authorization to the Commission on the ground that it might bring within the Railway Labor Act carriers whose employees were represented by their organization. See Hearings, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., H. R. 7650, pp. 107–110.

its *own decisions* construing the phrase "interurban electric railway" to exclude general carriers of freight as unauthorized and incorrect.

Previous administrative interpretation with respect to respondent. Prior to the holding here under review, the Commission had on only one occasion been called upon formally to determine respondent's status as an interurban; on that occasion (the *Locomotive Inspection Act* case, *supra*, pp. 49–51), the Commission found respondent not to be an interurban. The majority of the court below, however, was of the opinion that there had been a course of administrative interpretation of similar exemption provisos showing that the Commission regarded respondent as an interurban railway (R. 334). Respondent had called attention to the form of its reports to the Interstate Commerce Commission, to its classification under the Railway Mail Pay Act, and to its prior issuance of securities without Commission approval under Section 20a, and had claimed that it was not subject to the Federal Control Act.[34] A brief ex-

[34] Respondent also pointed out that in 1920 the now defunct Railroad Labor Board held that similar electric lines were interurban. United States Railroad Labor Board Decisions, Vol. I, p. 53, Dec. 33. Respondent was not a party to that decision, which has already been referred to. See page 47, *supra*. But, in any event, that decision is out of harmony both with the subsequent decisions of the Commission and with that of this Court in the *Piedmont* case. For the Piedmont & Northern was one of the carriers classified by the Railroad Labor Board as an interurban.

amination of these so-called administrative precedents will demonstrate that they do not support the conclusion respondent draws from them.

(a) Respondent's reports to the Commission have been filed on forms prescribed for "electric railways"—not on forms for "*interurban* electric railways" (R. 117–118). The Commission prescribes one form of reports for steam and one for all electric lines; the use of the latter by an electric railway obviously reveals nothing as to whether or not the Commission regards it as an interurban.

(*b*) The respondent has received pay for the transportation of mail under the rates prescribed for interurban railways (R. 313), but the Commission held no hearings and made no investigation or decision with respect to respondent's status under the Mail Pay Act. As the Commission declared in its opinion in the instant case (R. 322):

> The Utah Idaho Central is paid for carrying the mail at rates prescribed in *Electric Railway Mail Pay*, 58 I. C. C. 455, 98 I. C. C. 737, under an act applicable to "urban and interurban electric railway common carriers". The same is true of the other electric railways which have been found not to be interurbans within the exemption proviso in the Railway Labor Act, but the Commission has never determined the status of this or the other lines under the above-mentioned mail-pay act.

(c) The respondent did not obtain Commission approval of an issue of securities made during its

organization in 1926, as would have been required if it were subject to Section 20a (R. 117). Respondent did not request the Commission to approve the issuance of such securities, but in its annual report filed with the Commission in 1927 disclosed the fact that such securities had been issued (R. 112). In 1928, 1929 and 1930, the Bureau of Statistics and the Bureau of Accounts of the Commission corresponded with respondent with respect to the reorganization and issuance of the securities, requesting additional information and a change in the form of the account (R. 112–117)." No point was made by the Commission in any of these letters or otherwise that respondent had in 1926 failed to comply with Section 20a. Respondent relies entirely on this inaction, not upon any affirmative or considered ruling by the Commission itself, as showing that the Commission regarded it as an interurban. In view of the fact that in 1927 the Commission held in the *Locomotive Inspection Act* case (see p. 49, *supra*) that respondent was not an interurban, the negative inference which respondent seeks to draw from the

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These facts appear in the record in the district court were not shown in the evidence before the Interstate Commerce Commission. For that reason the court below could not have considered them. *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 433–445. The Commission could not take notice of information in its files not introduced into evidence. *Interstate Commerce Commission* v. *Louisville and Nashville R. Co.*, 227 U. S. 88, 93.

Commission's inaction under Section 20a during the same period is clearly dispelled.

(d) Respondent argued in its brief in the Circuit Court of Appeals that it was not brought under the Federal Control Act during the war because it was not an interurban railway. The Commission found it unnecessary to decide whether the carrier had in fact been under Federal control." What was done in 1918 by the Director General of Railroads under another statute and under different circumstances can not be deemed an administrative interpretation binding upon the Interstate Commerce Commission in 1933.

As contrasted with the above instances of administrative inaction, in the *Locomotive Inspection Act* case, *supra*, p. 49, upon formal consideration of a questionnaire filed by respondent," and in the instant case after a formal hearing the Commission held that respondent was not an interurban. These two considered rulings would seem to

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" The record is not clear as to whether respondent was subject to Federal control; the only official statement in the record bearing upon the question is a letter from the Director General which "relinquished" the carrier from Federal control (R. 228).

" Respondent attempts to distinguish the *Locomotive Inspection Act* case on the ground that the exemption in that statute did not contain the word "steam." But the word "steam" is only used in the portion of the proviso dealing with railways operating as "part of a general steam railroad system of transportation," not in the reference to interurban railway, and its presence or absence can not affect the meaning of "interurban electric railway."

be entitled to greater weight as administrative precedents than the proceedings under the Railway Mail Pay Act and the failure to act under Section 20a upon which respondent mainly relies. In any event, the most that can be said for respondent is that the administrative precedents are conflicting." With respect to this precise issue, this Court said in the *Piedmont* case (286 U. S. at 312):

> Only a word need be said with respect to the contention that governmental agencies have heretofore classified the railway as an interurban electric line. It is true that in connection with quite diverse administrative functions the United States Labor Board, the Postmaster General, and the Interstate Commerce Commission have classified petitioner's railway as an interurban electric line in distinction to steam railroads. Neither the administrative nor the statutory classification has, however, been uniform, and in any event is not controlling in this litigation.

Despite respondent's arguments, whenever its attention was directed to the question the Commission has consistently regarded the Utah Idaho and similar carriers as not coming within the exemptions for interurban electric railways in the

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[b] In *United States* v. *Chicago North Shore & Milwaukee Ry. Co.*, 288 U. S. 1, this Court gave effect to a *uniform* administrative interpretation of Section 20a in determining an electric railway's status under *that* section.

Interstate Commerce Act and related Acts. These views were known to the framers of the 1934 amendments to the Railway Labor Act. It would seem that the clear intention of Congress in changing the former law specifically to authorize the Commission to make the determination was that the Commission should follow the standards it had previously established. Selection by Congress of the Commission as the agency to decide the question would accordingly seem to constitute approval of the Commission's previous rulings on the subject.

Respondent introduced in evidence its charter (R. 235) and the ordinances passed by the various communities in which it operated granting it rights of way (R. 158). The charter authorizes respondent to operate railways "whether street or interurban, or railroads in general". The ordinances forbid the carrier to operate by steam; only in 8 out of 19 of the communities through which respondent operates did the ordinances describe the operations authorized as those of an interurban railway (R. 158). In any event the contents of state charters or local ordinances are irrelevant in determining the status of the carrier under Federal law. This Court has repeatedly held that the status of a carrier subject to federal regulation "does not depend upon whether its charter declares it to be a common carrier, nor upon whether

the State of incorporation considers it such; but upon what it does." *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304; *United States* v. *California*, 297 U. S. 175, 181; *New York* v. *United States* 257 U. S. 591.

Respondent has referred to several sections of Transportation Act, 1920 (41 Stat. 460, 469, 489, U. S. C., Title 49, Secs. 73, 77, 15a (1)), and to the Bankruptcy Act of 1933 (47 Stat. 1482, U. S. C., Title 11, Sec. 205 (m)), as impliedly recognizing that there might be interurban railways deriving over 50% of their revenues from the transportation of freight. It is sufficient to say with respect to this argument that Congress has employed over a period of years a number of different definitions of the electric railways exempt from various statutes regulating the railroads, that the diversity of these definitions indicates that Congress itself was in doubt as to how the exemption should best be drawn, and that in the three most recent statutes on the subject (the Railway Labor Act as amended in 1934, the Railroad Retirement Act and the Carriers Taxing Act) Congress has abandoned its former attempt at exact definition and left the question to the Interstate Commerce Commission to decide—unquestionably with knowledge of the manner in which the Commission had decided similar questions in the past.

III

The Constitutionality of the Railway L... Act

In its bill of complaint, filed and amend... fore the decision of this Court in *Virginian R... v. System Federation No. 40*, 300 U. S. 5... spondent challenged the constitutionality o... stantially all the important provisions o... Railway Labor Act, as amended in 1934 (R. ... 29–32). We do not know whether respond... tends to continue its attack upon the Act ... present time. Inasmuch as the validity of the ... ute can no longer be seriously disputed, it doe... seem necessary to prolong this brief by cons... tion of the constitutional question.

Conclusion

It is respectfully submitted that the judgm... the Circuit Court of Appeals should be rever...

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